No. 8768

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEN A. BOST,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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INTRODUCTION.

As appellant has stated, he was convicted by a jury on a charge of violating Section 80 of Title 18 of the United States Code. His conviction was based on his having knowingly falsified certain material matters in connection with the sale to the Mint of certain gold. The indictment charges that appellant on various specified occasions falsely represented that the gold so sold by him had been mined by him from the "Lucky Gravel" mining claim, which, according to his representations was located in Cougar Canyon, El Dorado County, California, of which claim he said he was the owner, whereas in truth and in fact he was not the owner of any mining claim in that County known as or called the "Lucky Gravel" claim, and

whereas in fact the gold in question had not come from the source specified by him in the verified affidavits submitted by him to the Mint. False affidavits to the same effect were tendered along with the gold offered by him for sale on five different occasions during the years 1934 and 1935.

Counsel for appellant have seen fit in their brief to argue at the outset the points of law advanced by them and then to give a more detailed statement of the facts to the Court. We believe that the Court will follow the testimony more easily if we reverse that order and summarize the facts upon which the indictment was founded before we undertake to consider appellant's legal contentions.

STATEMENT OF THE CASE.

It was the theory of the Government, which was upheld by the verdict of the jury and by the ruling of the Court denying appellant's motion for a new trial (R. p. 39) that the claim of appellant to have recovered the gold in question from this so-called "Lucky Gravel" mining claim, was but a figment of his imagination, and that the gold had in fact been secured by appellant from some other source or sources. The source or sources referred to, although not material in this case, may be inferred to a certain extent from the general tenor of the evidence and particularly from the testimony of Mr. Bongard, who was an employee of the State, and whose business it was to investigate the theft of so-called "high-grade" ore from the mines of California. (R. p. 107.)

Appellant's story of the circumstances under which he secured the gold in question has at least the merit of originality. Unfortunately for appellant, it was neither believed by the jury nor by the trial Court. After considering it one is reminded of the statement of the Supreme Court of Montana in an opinion recently quoted with approval by the Supreme Court of California to the effect that "The credulity of Courts is not to be deemed commensurate with the facility and vehemence with which a witness swears". (*Grant v. Chicago R. Co.,* 252 Pac. 382, quoted by the California Supreme Court in *Herbert v. Lankershim,* 9 Cal. (2d) 409, 472.) The appellant's story of the circumstances under which he had secured the gold in question, which in a period of 18 months aggregated over $15,000, was substantially as follows: In the year 1886 appellant had met a man in Trinity County by the name of Swissler. He had known Swissler there as a boy for a period of eight months. Appellant had not thereafter seen this friend of his youth until he showed up in appellant's assay office 42 years later, being some time in the year 1928. At that time this friend told appellant that he was prospecting and that he would like Bost to put up $250 to help him carry on his work. He told appellant that "he *thought* he would strike pay gravel; that he was in the gravel district". Whereupon and without further investigation upon the part of appellant he turned over the sum requested to Swissler. (R. p. 120.) For this $250 Bost was given a one-half interest in such discovery as Swissler might make. (R. p. 127.) This interest was evidenced by a bill of sale or receipt

which Bost could not find. (R. p. 127.) Swissler was to work the mine when it was discovered, and Bost was to get ten per cent, presumably of the net profits. (R. p. 127.) Bost inquired of Swissler what the name of the mine was and was told that it did not have a name. Bost then said, "We will call it 'The Lucky Gravel' ", to which Swissler agreed. (R. p. 120.) Swissler at that time stated that the mine was in Cougar Canyon, El Dorado County. Bost made no further inquiry in regard to the mine. Thereafter, according to Bost, on several occasions he made additional advances to Swissler. On those visits Swissler would bring over "bits of gold". (R. p. 124.) Bost could not recall how much those lots of gold brought in amounted to but thought that one of those "bits" amounted to 40 ounces, which at the then market value of gold should have been worth in excess of $800. Finally, in October, 1930, when the alleged Swissler called on Bost for more money Bost stated that he did not like to make any more advances unless he saw the mine. Swissler then stated that he would take Bost to it. The trip as described by Bost was made under incredible circumstances. He and Swissler went to the mine at night and returned at night. As a result Mr. Bost was, unfortunately for him, unable to take R. C. Lynn, Agent of the Bureau of Internal Revenue, to the mine when that gentleman, not being satisfied with the story told by Bost, asked him to show the Agent the property from which he said that he had secured the gold sold to the Mint. (R. p. 61.) Moreover, there was an unfortunate inconsistency in the version of that trip as given by

Bost on the witness stand and the version as he had told it to the Agent, as it was testified to by the Agent. Thus Mr. Bost testified on the trial that *Mr. Swissler,* when the subject of the trip to the mine was discussed between them, said that he had an old truck in Nevada City, where Bost then had his office and where the interview occurred, and that they would use that truck in going along the highway to Rattlesnake Bridge below Auburn, where the trail branched off from the highway to the mine. (R. p. 121.) Bost was quite specific in describing the route taken. After leaving Rattlesnake Bridge they traveled up the Middle Fork of the American River a distance of between thirty and forty miles to a point opposite Kennedy Hill. Then they turned off to the right and proceeded along a trail five or six miles until they reached the mine. (R. p. 127.) And yet the mine, which was improved by a 1000-ft. tunnel (R. p. 128) had never been heard of, so far as the record discloses, by anyone other than by appellant and his alleged associates, and could not be located either by appellant or by any of the Government's agents who made a thorough search for it. Agent Lynn's version of the trip, as told him by Bost, varied in very material respects. According to the story told by Bost to Lynn, it was *not Swissler* who had taken Bost to see the mine but one *Hensen.* Moreover, according to the statement made by Bost to Lynn, who testified from his notes made at the time of their conversation and turned over to counsel for appellant for his inspection (R. p. 148), his guide did not take him in the truck referred to by Bost, but in some fashion that was not

made clear by his testimony Bost found his own way to Rattlesnake Bridge, where Hensen met him with some jacks. (R. p. 61.) The two, Bost and Hensen (or Bost and Swissler as the case may have been), started from Rattlesnake Bridge after dark, traveled for about seven hours, arriving at the mine while it was still dark. Bost got up about 7 or 8 o'clock in the morning and, after breakfast, spent about two hours examining the property. (R. p. 128.) He said there was a 2-inch stream of water adjoining the mine which he admitted would be very valuable up in that county. But notwithstanding that fact Bost made no inquiry and no investigation relative to water rights on the stream. (R. p. 129.) He panned about three panfuls of gravel, at the expiration of which time he was tired and rested "all that afternoon and that night until about 4 o'clock the next morning". He then got up and had breakfast and left the mine, reaching Auburn at 1:30. (R. p. 129.) It developed from Bost's testimony on direct examination that he had only made the trip to the property out of curiosity and because Swissler had asked for another advance. (R. p. 120.) But on cross-examination he testified that before they started on the trip Swissler had offered to sell him the remaining half interest in the property for an additional $250. (R. p. 131.) He accepted this offer without having made any investigation of Swissler's title to the property or of the water rights pertaining to it. He admitted that he felt sure that the claim had not been recorded by Swissler because he, Bost, had named the claim himself. He said that he had not thought it necessary to

record the claim in his own name since Swissler "claimed to own the ground". (R. p. 122.) Such claim was entirely inconsistent however with the whole tenor of his direct examination. Moreover, according to Bost's story on cross-examination, when he went on the trip taking the $250 along to buy the second half interest he "couldn't say as to the approximate amount of gold that had been produced by the mine", and turned over to him between the spring of 1928 and October, 1930. (R. p. 131.) Why he took the $250 along instead of making the payment on his return in the event that he decided to make the purchase was not explained by Bost.

The lease that was signed by Bost in January, 1932, was executed under equally mysterious circumstances. At that time it will be borne in mind Bost claimed to own the whole property. The gentleman whose names purported to be signed to the alleged lease, Messrs. Swissler, Hensen and Larsen, are said to have appeared before Bost on or about January 2, 1932. They told Bost that they wanted to take a lease on the mine: "that they wanted to put more men to work there and that they wanted the lease so that they could give the other people a sub-lease". (R. p. 131.) After the execution of the lease, *Hensen* brought in, according to one portion of Bost's testimony, six lots of gold ranging in amount from approximately 80 ounces to approximately 120 ounces. (R. p. 133.) Immediately thereafter Bost testified that after the lease was signed "*Swissler* brought in the gold". (R. p. 133.) Although he was interested in getting his 10 per cent provided

for in the lease he made no record of any kind of the shipments that were brought in.

Suddenly and for some reason that is not clearly explained, the lessees seem to have mysteriously dropped out of existence. After the last shipment of gold Bost saw nothing more of them. He at no time wrote to or received any letters from them. (R. pp. 133, 134.) Although his alleged lessees had leased the property in order to increase the number of men at work and to give a sub-lease on it, Bost had no idea who the parties were to whom the sub-lease was to be given. As he testified, "I had a 10 per cent interest but I had no reason to be interested in who they subleased to nor whether they were capable miners or financially responsible". (R. p. 134.)

In view of the fantastic story told by Bost in attempted explanation of the origin of the gold sold by him to the Mint, it should hardly be necessary to go into the testimony of the Government which was introduced in disproof of appellant's story. Bost's testimony would seem to carry its own refutation upon its face. Nevertheless as a measure of precaution we will summarize the case made out by the Government. At the outset a representative of the United States Forest Service was called (R. p. 51) to identify an official map of the El Dorado National Park. This was offered for the purpose of showing that on this map, which included in detail the territory in which the alleged Lucky Gravel mine was said to have been located, no Cougar Canyon appeared. (The question of the admissibility of this map we

shall consider later.) A representative of the United States Geological Survey also identified certain of the topographic maps made and used by his Department. These maps, which included El Dorado County in detail, were also offered in evidence for the same purpose. (R. p. 54.)

Thereafter witness after witness was called to testify to the non-existence of the alleged Lucky Gravel mine and to a complete lack of knowledge in that locality of any of the alleged lessees of that mine. Thus, R. C. Lynn, the Agent of the Bureau of Internal Revenue who had interrogated Bost in regard to the alleged mine, testified to the search made for it by him. He was familiar with the Rattlesnake Bridge to which Bost had referred and to the highway on which it was constructed. (R. p. 59.) He told of the inquiries he had made and the searches on maps and records in the offices of the different county officials. He told of questioning the Forest Rangers and other Federal officials in that locality but without success. (R. pp. 65, 66.) The Government also called Charles B. Rich of the United States Secret Service (R. p. 96) who testified to his efforts to locate the mythical Lucky Gravel mine. He told of covering all of the territory described by Bost without success. He told of the different inquiries made of State and County officers in that locality and of the examination of the records of the County assessor and of the County Surveyor. He told of the search of the registration list in an effort to secure some information either about the mine or about Messrs. Swissler, Hensen or

Larsen. All of the efforts were without success. (R. pp. 96, 99.)

Mr. John Bongard was also called by the Government. Mr. Bongard was the "high grade" Inspector of the State Division of Mines, which position he had held for ten years. In that office it was his duty to supervise the issuance of licenses to gold buyers and to keep track of "high grading", which he explained referred to the theft of high-grade ore from the different mines of the State. Mr. Bongard told of his inquiries throughout El Dorado County and particularly in the vicinity described by Mr. Bost. He told of the inquiries made throughout that territory. He also testified to his examination of the records of the County Recorder and of the County Assessor in a search for some reference either to the Lucky Gravel mine or to any of the parties connected with it. As he testified "we found no record either of the mine or of the men mentioned". (R. p. 108.)

Thereafter witness after witness from that County was called to testify to his knowledge of the locality involved and to his ignorance of any Lucky Gravel mine as well as of the alleged lessees of that mine. Included among those witnesses were a Deputy Sheriff of the County, and also a mail carrier who had lived in that vicinity for approximately 30 years. (R. p. 79.) Incidentally this witness testified that he had mined for 25 years in that locality and that he had never heard of any Cougar Canyon or of any Lucky Gravel mining claim. Moreover, he testified that during that period of time there had not been much

mining in that locality. He further stated that there had been no real producers outside of those with which he had been connected, since he had moved into the district about 29 years before. He explained that by "real producers" he referred to a mine that would run from 10 cents to 50 cents a cubic yard. (R. p. 81.) It will be recalled that the Lucky Gravel mine, according to appellant's fabulous figures, ran from approximately $15 (R. p. 11) to $36 (R. p. 22) per cubic yard. Among the other witnesses called was a lookout for the Forest Service who had been located about 14 miles East of Georgetown (which was referred to by Bost in his testimony, R. p. 121) for about 16 seasons. He had neither heard of a Cougar Canyon or a Lucky Gravel mine. (R. p. 82.) Just one witness testified that he had heard of a Cougar Canyon, although he had never heard of a Lucky Gravel mine, or of its alleged lessees. (R. pp. 85, 86.) This witness was a lookout of the Forest Service who had resided in the vicinity involved all of his life. (R. p. 87.) It developed that his knowledge of Cougar Canyon was limited to the fact that when he was a boy about 10 years old, and about 48 or 50 years before he was called on to testify, he had heard of a canyon of that name. It also developed from the witness that one or two persons had also asked him about the whereabouts of a Cougar Canyon. No other evidence of the existence of the Canyon was offered. The County Assessor of El Dorado County, who had held that office for 14 years and had resided in the County for approximately 30 years, testified that not only had he never heard of Cougar Canyon or the Lucky

Gravel mine or of the lessees, but that, having charge of the assessment rolls of the County he could testify that there was no record of any assessment against any Lucky Gravel claim or of any tax assessed against any of the lessees named. (R. p. 89.) Similar testimony in regard to his lack of knowledge in his 40 years' residence in that County, of Cougar Canyon or of the Lucky Gravel mine or of the alleged lessees, was given by the County Surveyor. (R. p. 90.) Merchants and other businessmen were called with the same result. Without summarizing further along this line we believe that we may safely assume that the proof was ample that the mine referred to as well as the alleged lessees, never existed.

We now proceed to a consideration of the errors of law alleged by appellants that have been committed by the lower Court.

THE INDICTMENT IS SUFFICIENT.

Counsel at the outset point out in their brief a minor defect in the indictment. A similar defect was referred to by this Court in the comparatively recent case of *Hills v. United States* (97 Fed. (2d) 710). That defect is in the charge in the opening sentence of the indictment (R. p. 1) that the defendant falsified "a material *matter*" instead of "a material *fact*". Counsel refer to the holding of this Court in the *Hills* case that the discrepancy did exist. Counsel fail, however, to give any weight to the statement of this Court that the "deficiency", as it is

termed in the Court's opinion, would be cured were it not for an omission in the indictment of another allegation which the Court held did not appear. That omission, it will be recalled, grew out of the failure to charge that certain fictitious names that had been supplied by an accessory had, in fact, been incorporated and used in the affidavits that had been tendered to the Mint.

This latter defect as it was held to be, does not exist in the instant case because there is no accessory charged in this case. Hence the defect relied on by counsel clearly has no substance.

Moreover, we submit that the so-called deficiency in the reference to a falsification of a matter instead of a fact does not exist in view of the language of the whole indictment. The opening sentence in which the discrepancy appears could have been entirely omitted and the indictment would have been sufficient. But even with the opening sentence included, the point we submit is of no consequence in view of the fact that the sentence refers to matters falsified by the appellant "as hereinafter set forth". The defect, if it is to be regarded as such, certainly could not have prejudiced appellant within the requirement of Section 556 of Title 18, of the U. S. Code.

Appellant urges that "there is nowhere alleged what the material fact is that induced the Treasury Department to purchase the gold". (Br. p. 13.) We submit that there is no necessity that such an allegation appear. Section 80 of Title 18 at one time provided that "Whosoever shall make or cause to be

made, or present or cause to be presented, for payment or approval * * * any claim upon or against the Government of the United States * * * knowing such claim to be false, fictitious or fraudulent; or whoever *for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States* * * * shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device, any material fact * * *'' shall be punished as provided. However, when the section was revised in 1934 the language italicized was omitted. Hence there was not only no necessity of alleging that the misstatement of the appellant had in fact induced the Treasury Department to purchase the gold but no necessity of even alleging that the falsification of the appellant was with the intent of cheating, swindling or defrauding the Government.

Counsel for appellant further urge not only that the indictment is ''vague and indefinite'' but also claim that ''as a matter of fact the falsity of the affidavit itself is not alleged directly and positively as required'' by law. (Br. pp. 14, 15.) We have difficulty in following counsel in view of the language of the indictment, which in our opinion is more complete than was necessary. It will be recalled that the indictment charges in Paragraph III of the First Count:

> ''That on or about the 6th day of April, 1934, said defendant requested of the Mint of the United States, located at San Francisco, Cali-

fornia, which was then and there an agency of the Treasury Department of the United States, that it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose of inducing said Mint to purchase said gold, and in purported compliance with said regulations above mentioned, said deposit of gold was accompanied by an affidavit executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit 'A', and made a part hereof; that in and by the terms of said affidavit, said defendant wilfully, knowingly and unlawfully, and contrary to his oath in said affidavit taken, declared, certified and swore to certain material matters which were not true and which he did not believe to be true when he swore to said affidavit, to-wit: That he was the owner of a mining claim called the 'Lucky Gravel' claim, and that the source of said gold so tendered and deposited was 'Lucky Gravel claim, mostly small nuggets', and that said gold had been recovered from said claim, which claim it was stated in said affidavit was located in Cougar Canyon, El Dorado County, California, whereas in truth and in fact as said defendant then and there well knew, he was not the owner of any mining claim in said County and State, known as or called the Lucky Gravel claim, and whereas in truth and in fact the source of said gold was not said Lucky Gravel claim, and said gold had not been recovered from said alleged claim, which facts said defendant at all times well knew." (R. pp. 3-4.)

Similar allegations appear in the other counts in the indictment. Counsel state that the portion of the

paragraph reading "whereas in truth and in fact as said defendant then and there well knew, he was not the owner of any Lucky Gravel claim, and in truth and in fact the source of the gold was not the Lucky Gravel claim and the gold had not been recovered therefrom", are "words of recital only and are not positive and direct allegations of falsity". No authorities are cited in support of this claim and, we submit, for obvious reasons. Counsel do not suggest how the allegation could have been made more directly or more positively and we are at a loss to know even with the assistance of counsel's comments how it could have been made more positive or direct.

Appellant next urges that the counts in the indictment are uncertain "in that they do not directly allege that the gold which Bost deposited for sale with the Mint was the class or type of gold which required a filing of the affidavit in question", (Br. p. 17), nor that the misrepresentations were material. (Br. p. 19.) No authorities are cited in support of this contention. We submit that it is without merit. Section 35 of the Regulations* provides that the Mints are authorized to purchase certain kinds of gold. Included among the kinds specified is "gold recovered from natural deposits in the United States or places subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use". Section 38 of the Regulations provides that the Mints shall not purchase gold under the clause just quoted "unless the deposit of such gold is accompanied by

*This Court will of course take judicial notice of the Regulations referred to, since they were authorized by Congress. (31 U. S. C. §442; *Caha v. U. S.*, 152 U. S. 211.)

a properly executed affidavit", on Form TG-19, which must be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States, with certain exceptions not here relevant.

According to appellant's contention (Br. p. 18) "it should have been definitely and positively alleged in all five counts just what type or class of gold was deposited with the Mint * * *"

We submit that it was not necessary to allege any more than was alleged. Of course it is elementary that Government regulations such as those involved have the force and effect of law. *(F. T. Dooley Lumber Co. v. U. S.,* 63 Fed. (2d) 384, 386.) In the instant case appellant represented that he was one of the persons who came within one of the classifications mentioned in the Regulations, and that the gold that he offered for sale had been recovered by him by mining or panning in the United States, and that he had recovered the gold from a certain specified mine during a certain specified period of time. These sworn statements so made to the Government have been found by the jury to be false. Whether or not the facts required to be specified were material was for the executive branch of the Government to determine. Since it did require those facts to be specified, this Court must presume that its action in making such a requirement was reasonable. The fact that the Government did see fit to require such representations in connection with the sale of gold of the type described is sufficient proof that the representations were material. Say counsel for appellant: "to plead

him (appellant) within Section 80 for having filed a false affidavit with said gold, the Government had to specifically plead facts to show that Mr. Bost deposited gold of the type requiring this particular affidavit". (Br. p. 20.) According to this logic had appellant imported gold from a foreign country and then sold it to the Mint on the written representation that the gold had been recovered by him by mining or panning it from a mine located within the United States, he could not have been successfully prosecuted notwithstanding his conceded misrepresentation, because, according to appellant, it would have been necessary for the Government to specifically plead facts showing that Bost had sold it gold "of the type requiring this particular affidavit". Obviously this could not have been done under the circumstances and hence a prosecution could not have been successfully maintained. Such an argument is obviously unsound.

Likewise, without substance is the contention (Br. p. 20) that the indictment is defective in that it does not allege "that the Federal Government ever purchased the gold deposited by Mr. Bost or in any way relied upon the affidavit filed by him, or that it was misled thereby". No such requirement appears in the law. The charge is not that the defendant secured the purchase price of the gold by having made false and fraudulent representations that were relied on by the Government, but merely that he wilfully falsified certain material facts in a matter within the jurisdiction of a department of the United States. So to do is a violation of the statute involved.

THE MAPS OFFERED IN EVIDENCE WERE ADMISSIBLE.

It will be recalled that the Government offered in evidence as part of its case in chief, certain maps. One of the maps (Government's Exhibit 2), was identified by one H. C. Sedelmeyer, a Civil Engineer employed in the United States Forest Service. He testified that he had been engaged in that branch of the Government for 25 years. The map identified by him bears the inscription:

U. S. Department of Agriculture
Forest Service
El Dorado National Forest
California-Nevada
Mt. Diablo Meridian

The witness testified that the map was an official map of his department. He also testified that it was prepared from United States surveys, General Land Office surveys and from the surveys of the Forest Service, by one of the draftsmen in his office under his own supervision. (R. p. 52.) The other maps referred to (Government's Exhibit 3) were the usual topographic maps in common use. They bore the official inscription "Department of the Interior—U. S. Geological Survey". (R. p. 54.) They were identified by one H. D. McGlashan, Assistant Geological Engineer in the employ of the United States. Mr. McGlashan testified that he had been with the United States Geological Survey for 31 years. The maps in question, he stated, had been received from the Washington office of the United States Geological Survey and were the official maps used in that de-

partment. The maps were offered, as was explained, for the purpose of showing that on none of them, notwithstanding the detail with which they were prepared, did Cougar Canyon appear, though many other canyons and other topographic features were shown.

The law is well settled that such documents are admissible in evidence. As this Court held in the case of *United States v. Romaine* (255 Fed. 253) maps of the United States Coast and Geodetic Survey "should be taken as absolutely establishing the truth of all that they purport to show".

The maps constituting both Exhibits 2 and 3 are admissible in evidence under a well settled exception to the hearsay rule. The particular exception has to do with official records. Many types of official documents are admissible under it, including records, registers, maps and miscellaneous documents. (See *Sheehan v. Vedder,* 108 Cal. App. 419, 425-6.) One class of such records has been before the Court frequently in recent years. Those records are reports of physicians of the Veterans Bureau on examinations of claimants for disability compensation. As was pointed out by the Circuit Court of Appeals for the Fourth Circuit in the case of

Long v. U. S., 59 F. (2d) 602,

they fall clearly within the principle under which exceptions to the hearsay rule are admitted, namely: necessity and circumstantial guaranty of trustworthiness. Said the Court in that case:

> "As to trustworthiness, it is made by an official of the government in the regular course of duty,

> who presumably has no motive to state anything but the truth, and it is made to be acted upon, and is acted upon, in matters of importance by officials of the government in the discharge of their duties."

It was at one time believed that such official records were not admissible unless there was a statute expressly requiring them to be kept. This rule is no longer followed. As the Supreme Court of the United States held in the case of

Sandy White v. U. S., 164 U. S. 100, 103,

in ruling that a record book kept by the jailer of a public jail in Alabama was admissible:

> "Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it. In that case the entries are competent evidence."

The Third Circuit Court of Appeals held to the same effect in the case of

Chesapeake & Delaware Canal Co. v. U. S., 240 Fed. 903, 907,

in holding that certain records kept by the United States Treasurer were admissible:

> "We understand the general rule to be that when a public officer is required, either by statute or the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordi-

> narily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually kept by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage."

This Court has held to the same effect in

Greenbaum v. U. S., 80 Fed. (2d) 113, 126.

In fact it is not required that the keeping of the books or other records be essential to the conduct of the office. It is sufficient if the keeping of such records constitutes a convenience in connection with the conduct of such office.

> "Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record."

This statement was quoted with approval in

People v. Tomalty, 14 Cal. App. 224, 231.

It is obvious that all of the reasons advanced by the different Courts referred to above apply fully to the

question of the admissibility of the maps received in evidence.

Of course the maps were not conclusive. It was entirely competent for appellant to prove that a Cougar Canyon did exist somewhere in the vicinity where he claimed that the Lucky Gravel Mine was to be found. However, appellant made no attempt, except by his own unsupported testimony, to prove the existence of a Cougar Canyon or a Lucky Gravel Mine.

THE TESTIMONY OF AGENT LYNN REGARDING HIS CONVERSATION WITH APPELLANT WAS ADMISSIBLE.

Counsel for appellant next urge (Brief p. 27) that the Court erred in admitting the testimony of R. C. Lynn of the Bureau of Internal Revenue in regard to the conversation he had with appellant prior to the latter's arrest. The only objections urged in the lower Court (R. pp. 58, 60) were that "the corpus delicti has not been proved". This mere statement of the point should be sufficient to dispose of it without further argument. It is true that in conspiracy cases it has been held at times that a conversation between one of the alleged conspirators and a government officer is inadmissible until a "corpus delicti" has been proved. However, the preferred doctrine today is that it is entirely within the discretion of the lower Court whether it will allow evidence of such conversations prior to the proof of the conspiracy. No similar requirement in either form

exists as a preliminary to the admission of proof of a conversation with a defendant under the circumstances shown in this case.

THE TESTIMONY REGARDING THE SEARCHES MADE AND THE ANSWERS TO INQUIRIES WAS ADMISSIBLE.

Appellant's next contention (Brief p. 30) is that the Court erred in allowing testimony to be given through certain witnesses called by the government regarding the result of the searches made for a Cougar Canyon and a Lucky Gravel Mine. The objections interposed to this line of testimony were that it was hearsay. (R. pp. 65, 77 et seq.) This objection, like the one interposed to the admissibility of the official maps offered by the government, overlooks a settled exception to the hearsay rule under which answers to inquiries made regarding the whereabouts of a certain person are admissible. This question was passed upon by the Circuit Court of Appeals for the Fifth Circuit in the case of

Nichols v. U. S., 48 F. (2d) 46.

In that case the defendant had been charged with using the mails to defraud by procuring the issuance of life insurance policies to fictitious persons. In order to prove that the persons were fictitious, it was held that testimony of persons living in the town where an insured was claimed to live, such as the postmaster, that they had never known of such a person there, that his name was not in the city directory or in the telephone books, and that on inquiry they could not learn of him, was admissible. As the Court said,

"Had they been persons with no special opportunity to know the residents of Lakeland, and had they made no inquiry for Smith, their not knowing him would have proven nothing. But the burden of showing that no such person had lived in Lakeland could have been borne in no other way than by such proof as was offered. While not a demonstration, it was some evidence of the negative fact to be proved."

The matter has also been passed upon by the California Supreme Court in the case of

People v. Eppinger, 105 Cal. 36.

It appears that a defendant had been charged with forgery in having made a fictitious instrument purporting to be the check of a person who was claimed by the state to have no existence. To prove the nonexistence of the maker, a city directory was offered and received in evidence. It was held on appeal that it had been properly admitted. It was also held that evidence of a police officer that he had made inquiries regarding the alleged payee of the check without success, was admissible. As the Court said:

"The character of the directory, and the extent of the inquiries, might affect the weight but not the competency, of the evidence."

Again in the case of

People v. Sanders, 114 Cal. 216,

a defendant had been charged with the forgery of a draft. The defendant testified to money having been paid by one Knausch on account of the purchase price of certain land that was involved in connection with

the alleged transaction. The prosecution claimed that Knausch had no existence. The prosecution called the sheriff of the county and proved by him that he had made search and inquiry as to the existence and whereabouts of the alleged Knausch. He testified, as the Court's opinion states, (p. 234) that he had inquired of Knausch from all the old citizens and at every hotel, livery stable and railroad ticket office in Fresno County; that he had carried on similar investigations all over the state for over a year and during the whole time he had never found a man who had ever known or heard of John Knausch. The defendant objected to the introduction of this evidence on the ground that it was hearsay. (p. 219.) The Court held that the evidence was admissible.

Nor is this doctrine merely a California one. In the Michigan case of

People v. Sharp, 19 N. W. 168,

on trial on a charge of forgery, the government, in order to prove that an alleged subscribing witness did not exist, offered the testimony of the sheriff. Said the Court:

> "The sheriff's testimony of his inability to find or hear of any such man as the one whose name appeared as the second subscribing witness, was properly received. There is no other way in showing that a name is fictitious. The extent of his search and opportunities would go to the weight, but not to the competency, of his testimony."

This disposes of the arguments advanced by appellant. We submit that the appeal is without merit

and that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
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Respectfully submitted,

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